No. 5705

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY (a corporation),
Appellant,

vs.

J. H. HANSON and JENNIE B. HANSON,
Appellees.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT OF THE CASE.

This is an action in fraud. Appellees by their complaint, which appears on pages 1 to 7 and pages 10 to 13 of the Transcript, allege that when the cause of action arose they were residents of the State of Minnesota, wholly unfamiliar with California farm and fruit lands; that to induce them to purchase land from appellant it falsely and fraudulently represented to them that all of the ten acre tracts of land in Sacramento, California, then being sold by it were of the fair and reasonable value of two hundred seventy-five ($275.00) dollars per acre, and that all of the land thereof was rich and fertile, capable of producing

all sorts of farm crops and products, entirely free from all conditions and things injurious or harmful to the growth of fruit trees, perfectly adapted to the raising of fruits of all kinds in commercial quantities, capable of producing large crops of any kind of deciduous fruit planted thereon, and that such crops would be of the finest quality; that these same representations were made in respect of lot number twenty-two (22) of Rio Linda Subdivision No. five (5), one of the tracts of land above mentioned; that, relying upon these representations, both as to quality and as to value, they purchased said lot, consisting of ten acres of land at the price of two hundred seventy-five ($275.00) dollars per acre; that it was actually worth but fifty ($50.00) dollars per acre, and that the representations above stated as to the quality of the land were all false; that upon these representations they purchased the land on November 1, 1921; that in reliance upon the representations they expended certain money for improvements; that this money was largely lost because of the falsity of the representations; that appellant should be subjected to punitive damages, and the complaint concluded with the prayer for judgment in the sum of approximately ten thousand ($10,000.00) dollars.

The action was filed February 29, 1928, six years and four months after the cause of action arose. To meet the apparent difficulty that the cause of action was barred by the statute of limitations when filed, appellees allege: "that plaintiffs did not discover the falsity of said representations or any of them until about the month of February, 1928."

A demurrer was interposed to this pleading and the same was sustained. Whereupon appellees filed an amendment to their complaint, designed to meet the objection that the cause of action was barred. By that pleading, which appears on pages 10 to 13 of the transcript, they alleged in substance as follows: That all the lands adjoining the lands purchased by appellees had been sold by appellant to persons formerly residing at points distant from California; that it was generally believed in the locality of said lands in February, 1927, that the same were fruit lands of the value of three hundred fifty ($350.00) dollars per acre and upwards; that appellees did not plant any fruit trees until the spring of 1925, at which time, it is to be observed, they had been upon the property approximately two and a half years, it being proven by their own testimony (Transcript, page 48) that they had moved to California and occupied the land on November 1, 1922. Appellees further allege that the trees appeared to do well during the balance of the year of planting, but some died in 1926; more in 1927. Appellees being advised that some trees do die in any soil, did not therefrom discover the falsity of the representations; that plaintiffs had no occasion to borrow money on the property, save from the appellant or through its arrangements; that they never discussed the value of the property with any real estate broker, salesman or banker, save that in 1927 they made a statement of assets to a banker which took no exception to the valuation of $275.00 per acre placed upon the land they had purchased.

Appellees further alleged that though others holding surrounding lands complained that fraud had been practiced upon them, which happenings occurred in 1927, they themselves did not believe the statements until suits were filed and one of them tried, resulting in a judgment for plaintiffs upon the ground of fraud. Whereupon these appellees say they discovered, in February, 1928, that they had been defrauded.

To these amended pleadings appellant interposed a demurrer (Transcript, page 14), pleading the bar of the statute of limitations, and, generally, that the complaint as amended stated no cause of action, and this demurrer was overruled. (Transcript, page 15.) Appellant answered, denying the material allegations of the complaint, and the amendment thereto. The case was tried to a jury, and on October 17, 1928, the jury returned a verdict in the sum of two thousand ($2000.00) dollars. From the judgment entered thereon this appeal has been taken.

The questions presented involve errors alleged to have been committed in the proceedings below in the overruling of appellant's demurrer, in denial of appellant's motion for a directed verdict, in the admission of testimony over the objection and exception of appellant, in the charge of the Court to the jury, and in the refusal of the Court to give instructions requested by appellant, all of which matters appear more fully in the specifications of errors next herein stated.

SPECIFICATIONS OF ERRORS RELIED ON.

(1) The Court erred in overruling appellant's demurrer to the complaint as amended in the above entitled cause.

(See Assignment of Errors, page 30 of Transcript, Assignment No. I.)

(2) The Court erred in overruling an objection to a question asked the witness Davis.

(See Assignment of Errors, page 30 of Transcript, Assignment No. II.)

(3) The Court erred in overruling the appellant's motion for a directed verdict.

(See Assignment of Errors, page 30 of Transcript, Assignment No. III.)

(4) The Court erred in instructing the jury on the question of appellant's knowledge of the falsity of the alleged representations.

(See Assignment of Errors, page 32 of Transcript, Assignment No. VI.)

(5) The Court erred in instructing the jury upon the definition of a "commercial orchard."

(See Assignment of Errors, page 33 of Transcript, Assignment No. VII.)

(6) The Court erred in instructing the jury on the question of present adaptability of soil to the raising of fruit.

(See Assignment of Errors, page 35 of Transcript, Assignment No. IX.)

(7) The Court erred in instructing the jury on the question of the time of the discovery of the alleged fraud with regard to the statute of limitations.

(See Assignment of Errors, page 36 of Transcript, Assignment No. X.)

(8) The Court erred in refusing to instruct the jury upon the question of the statute of limitations, as requested in appellant's proposed instruction No. I.

(See Assignment of Errors, page 40 of Transcript, Assignment No. XI.)

(9) The Court erred in refusing to instruct the jury concerning the effect of the discovery by appellees of the falsity of material representations, as requested in appellant's proposed instruction No. II.

(See Assignment of Errors, page 42 of Transcript, Assignment No. XII.)

(10) The Court erred in refusing to instruct the jury concerning the effect of appellees having been able by reasonable diligence to discover the falsity of the alleged representations as requested in appellant's proposed instruction No. IV.

(See Assignment of Errors, page 43 of Transcript, Assignment No. XIV.)

(11) The Court erred in instructing the jury that appellant by its booklet represented the land sold to appellees to be well adapted to the growing of deciduous fruits commercially.

(See Assignment of Errors, page 44 of Transcript, Assignment No. XV.)

(12) The Court erred in instructing the jury that the statements in appellant's literature applied to the lands purchased by appellees.

(See Assignment of Errors, page 44 of Transcript, Assignment No. XVI.)

ARGUMENT.

THE COURT ERRED IN OVERRULING APPELLANT'S DEMURRER TO THE COMPLAINT FILED IN THE ABOVE ENTITLED ACTION.

We have hereinbefore referred to the portions of the record wherein appears the complaint and the amendments thereto, and the demurrer interposed by appellant. The demurrer was both general, and, in addition, set up the statute of limitations. This statute of limitations is found in the California Code of Civil Procedure, being Subdivision 4 of Section 338 thereof, and reading as follows:

> "The periods prescribed for the commencement of actions other than for the recovery of real property are as follows:
>
> *Within three years:*
>
> An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

In the case of *Sacramento Suburban Fruit Lands Company v. Melin,* No. 5671, pending on appeal in this Court, is a full discussion of the rules of law applicable to cases of fraud brought more than three years after the accrual of the cause of action, together with a full citation of authorities upon which appellant relies herein. For the sake of brevity we will not repeat the arguments and authorities advanced therein and quoted, but will state the propositions therein advanced briefly, in support of our claim herein that the Court erred in overruling appellant's demurrer.

This distinction, however, between the *Melin* case and this case should be noted, to-wit, that by an amendment to their complaint the appellees sought to meet the objection herein urged, which effort was not made in the *Melin* case. We submit, however, as we shall hereinafter attempt to show that the attempt made by appellees in this regard was abortive, and that in effect their amendment added nothing to the statement of their cause of action or the answer to the objection that their action was barred by limitation. Probably the best known statement of the rule in pleading such matters appears in *Lady Washington Consolidated Company v. Wood,* reported in 113 Cal. 486. Summarizing from the statements there, but practically quoting them, we find the following:

The right of a plaintiff to invoke the aid of a Court for relief against fraud after the expiration of three years from the time the fraud was committed is an exception from the general statute on that subject and cannot be asserted unless the plaintiff brings himself within the terms of the exception. It must appear that he did not discover the facts constituting the fraud until within three years prior to commencing the action. *This is an element of the plaintiff's right of action and must be affirmatively pleaded by him in order to authorize the Court to entertain his complaint.* "Discovery" and "knowledge" are not convertible terms and whether there has been a discovery of the facts constituting the fraud, within the meaning of the statute of limitations, is a question of law to be determined by the Court from the facts stated. It is not sufficient to make a mere averment

thereof, but the facts from which the conclusion follows must themselves be pleaded. It is not enough that the plaintiff avers that he was ignorant of the facts at the time of their occurrence, and has not been informed of them until within the three years. He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them, as that they were done in secret or were kept concealed; and he must show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the Court may determine whether the discovery of these facts was within the time alleged; and, as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, he will be deemed to have had actual knowledge of these facts.

Testing the original complaint filed herein, we find the only attempt made by appellees to bring themselves within the rules of pleading above stated is found in paragraph IX of said complaint, wherein it is alleged, "that plaintiffs did not discover the falsity of said representations, or any of them, until January, 1928." The original complaint states nothing whatever in addition to the above quoted words upon this matter.

Referring again to the *Lady Washington* case above cited, we quote the following from the opinion therein as particularly applicable to the situation presented in the case at bar:

> "Testing the complaint herein by these rules, it falls far short of showing that the plaintiff is within the exception to the statute, or that its cause of action is not within the apparent bar of the statute * * * It was necessary for the plaintiff to allege not only the facts constituting this fraud, but also the facts connected with its discovery, so that it might appear from the complaint that the action was not barred by the statute of limitations. The only averment by the plaintiff in this respect is that 'it was not informed of and did not know or discover any of the aforesaid frauds, or the facts connected therewith until within six months preceding the filing of the complaint herein.' It is not averred that any of these facts, or of the transactions set forth as constituting the fraud, were done secretly, or were concealed from the plaintiff, or that any information which it sought was refused, or that, indeed, it sought to obtain any information upon the subject."

To this original complaint a demurrer was interposed which was sustained by the Court below and thereupon appellees amended their complaint as hereinbefore noted. We submit that when the amendment is tested by the same rules, it fails as signally to meet the objection as did the original pleading.

We have hereinbefore analyzed the amendment. The averment that the surrounding lands had been sold to persons resident at points distant from California, and that it was believed generally in the locality of the lands up to February, 1927, that they were fruit lands of the value of three hundred fifty ($350.00) dollars per acre and upwards, adds nothing to the pleading. This is so for the reason that it is not alleged that these appellees ever inquired concern-

ing the value of the lands or their adaptability for fruit culture, even from their neighbors, but it does affirmatively appear that appellees "never discussed said property or its value with any real estate broker, salesman or banker" until a period well within the statute of limitations.

It is not alleged, as it could not be alleged, that appellees remained distant from the land they had bought, and that they therefore had no opportunity of making a full investigation concerning the truth or falsity of the representations upon which they claimed to have implicitly relied in the purchasing thereof.

The only other matter alleged has to do with what might be termed a practical test, consisting of the planting of a few trees upon the land in the spring of 1925, but this also occurred within the three years prior to the commencement of the cause of action, and of course does not aid the pleading for that reason, except that it is a statement concerning the time discovery was made. It does not, however, attempt to meet the requirement that the pleading must set out the reasons why discovery was not made sooner. Actual discovery apparently awaited the rendition of a judgment by the Court in favor of a neighbor of appellees, which occurred in February of 1928, just prior to the filing of their suit. The purpose of pleading the facts constituting the discovery is to enable the Court to see whether or not the facts discovered and the nature of discovery could be said to meet the requirement of due diligence in the discovery. The matter is one of law as held in the case above cited.

The significant thing about the story of discovery as told by appellees in their pleading is that it leaves them confessing they had not themselves asked a single question concerning the truth or falsity of the representations relied upon, and confessing that they had not themselves exercised any—even the slightest—diligence to detect their falsity. The story is rather one of being bludgeoned into discovery and conversely shows a deliberate slumbering upon their rights. If the other allegations of their complaint be true, this land they had purchased was totally unfitted for the purpose for which they claimed they bought it, and was of a value of only fifty ($50.00) dollars per acre, as against the two hundred seventy-five ($275.00) dollars per acre which they had paid therefor.

The pleading states a situation discoverable by the most simple inquiries. If appellees had any duty of investigation and inquiry whatsoever it is inconceivable that such inquiry would not have immediately led to information, and certainly their pleading proves they made no inquiry whatever. Analyzed, that is the sum and substance of the matters pleaded in the amendment.

That these appellees were obliged to make seasonable inquiry when they arrived upon the property is demonstrable from the authorities and from the standpoint of reason. They had purchased property from an adverse party in interest, dealing with them at arm's length, and under a situation wherein, because they were distant from the property itself, they may, for the purpose of argument, be conceded the right to rely upon the seller's statements. But in so doing,

they knew, as all prudent people know, that they were taking and relying upon the statements of an adverse party, and were not making any investigation of their own to test the truth of these statements. They knew, as all men know, that sellers are given to exaggeration concerning the quality and value of that which they are offering for sale, and that as prudent buyers they should take these statements with a grain of salt. To be entitled to rely on them in parting with the price of the property, and having the right of holding the seller to the truth of its representations, should they thereafter prove to be false, they are faced with the consequent duty arising at once when seasonable opportunity for investigation presents itself, to make that investigation, and if information easily arrived at is accessible, they are seasonably held to know whatever such investigation would have disclosed. They stand confessed of having made not the slightest inquiry or investigation during the entire period of three years and four months preceding the three years before they filed their action. They do not say in their pleading that they did not have opportunity of investigation, as, of course, they could not honestly say so, since it appears from their evidence as hereinbefore noted that they occupied the property for approximately six years before beginning their action. The adaptability of land to any special use is a matter upon which information can be readily obtained.

But even stronger is the question of value. Upon this matter information sufficient to disclose the startling discrepancy between the price paid and the real value as alleged in the pleading could not but have

been obtained by the least inquiry or effort. If this allegation be true, and it is taken to be true for the purpose of the demurrer, a question asked of a banker, real estate broker or real estate salesman, acquainted with values in the community, could not fail to have informed appellees that they had been defrauded, and, in addition, have informed them of the exact measure and extent of their damage and their cause of action therefor. Armed with that information, it matters not whether they pursue inquiries concerning the condition and quality of the land or its adaptability for a special use or not. They know of their cause of action and the extent to which they have been injured, and knowing this, the statute of limitations begins to run. Far from making such inquiries, and it was apparently in the minds of the appellees, as it must be apparent to any other person, that inquiries of such people are ordinarily required of prudent people seeking information upon such subjects, these appellees affirmatively plead that they did not make such inquiries. The reasoning these people adopted in amending their complaint demonstrates conclusively that they knew, as all men do know, just where they could have obtained the information. They evidently felt that they should have inquired, if they really sought information, of just the sources they named, and felt obliged to state that they did not make such inquiries, because obviously they did not dare to allege they had made them and that the information had not been forthcoming.

So it makes no difference whether or not appellees began a practical test by the planting of trees two and

a half years after they had occupied the property, for certainly they made no practical test of the question of value, and if they failed to show a reason why they could not have discovered that misrepresentation within the period preceding the limitation period, their pleading is as defective as though they had made no effort to discover any misrepresentation. The matter of value misrepresentation was by far the most important of the two. This was demonstrated by the testimony of the only value witness which they placed upon the stand, one Howard D. Kerr, who testified (Transcript, page 67), that if the representations concerning the adaptability of the land for fruit culture had been true, the value of the land would then have been around $125.00 or $150.00 an acre. The greatest injury caused to appellees, then, if their testimony and pleadings be true, was inflicted upon them by the misrepresentation as to value, and upon that point they have not a word to say in their amended pleading in excuse of their failure to discover the misrepresentation for approximately six years and over after moving upon the property and having thus had open to them every avenue of information that existed.

Referring briefly now to the authorities concerning this matter of their duty in the premises, if they wish to hold the appellant responsible for its alleged representations, we refer the Court to the following:

It is held in *Gratz v. Schuler,* 25 Cal. App. 122 (citing *Ruhl v. Mott,* 120 Cal. 668 and *Bacon v. Soule,* 119 Cal. App. 427,) that:

> "Where a party to a contract ascertains that the other party has falsely represented one ma-

terial matter in the transaction, it is notice to him that the representations as to other matters may also be false, and it is therefore incumbent upon him to thereafter make a full investigation as to the truth or falsity of all of such matters."

In *Montgomery v. Peterson,* 27 Cal. App. 675, citing numerous decisions in support of its declaration, the Court said:

> "By passing this point, together with the more serious question of whether or not the complaint was sufficient excuse why discovery of the fraud was not made within three years, we think that the evidence in the case fails utterly to sustain the finding of the Court in favor of the plaintiffs in that regard. Subdivision 4 of Section 338 of the Code of Civil Procedure provides that in the case of fraud or mistake the action must be commenced within three years after the discovery by the aggrieved party of the facts constituting fraud or mistake. Under the cases in this State it is not enough to assert that the discovery was not sooner made. *It must appear that it could not have been made by the exercise of reasonable diligence and all that reasonable diligence would have disclosed, plaintiff is presumed to have known, means of knowledge in such case being the equivalent of the knowledge which it would have produced.*"

There was nothing that was concealed about this fraud, or that could have been concealed. All possible information would have been forthcoming upon inquiry. Peculiarly applicable to the situation of appellees are the remarks of the California Supreme Court in the case of *Johnston v. Kitchin,* 265 Pac. 941, wherein the Court said:

> "What secret, may we ask, could be suppressed that would or could affect the value of a com-

> mercial city lot, the title to which is a public record and its value an open matter of investigation to the entire public? We know of none, and think, in a practical sense, none can exist."

We will close our citation of authorities by quoting from *Angell on Limitations*, Section 187, wherein that learned author says that:

> "If the party affected by any fraudulent transaction or management might with ordinary care and attention have seasonably *detected* it, he seasonably had actual knowledge of it."

What is meant by the expressions "diligence," "investigation," "detection," as descriptive of the obligation resting upon those who claim they did not discover fraud of which they were the victims? Does it mean a slumbering along until bludgeoned into knowledge by the acts of strangers? Of course it does not. And yet that is all which appellees' pleading of facts in excuse of non-discovery amount to. Appellees pleaded, no doubt, as strongly as they dared, but they did not meet the test, as of course they could not meet the test, for it is utterly impossible for an owner of property, presumptively knowing the value thereof, to reside thereon for over three years and then to show by a pleading why he did not during that period discover that the value of it was less than one-fifth the amount he believed it to be when he moved upon it.

Appellees' pleading in this regard is not lacking in elements of humor. Some of their trees died—they suspected nothing. More died—and such suspicions as they might have had apparently died with them. Their neighbors swore to complaints in fraud

before the State Real Estate Commissioner, and the district attorney made "some sort" of investigation. Appellees slumbered on. Suits were filed, and the repose of appellees remained undisturbed. Judgments were rendered on the suits, and at last appellees "considered their land further and * * * discovered * * * that they had been defrauded." As a showing of due diligence we submit the pleading referred to is a masterpiece.

THE COURT ERRED IN OVERRULING AN OBJECTION TO THE QUESTION ASKED THE WITNESS DAVIS.

Herbert C. Davis was an expert witness called to the stand by appellees to prove that their land was not suited for fruit culture. His testimony appears on pages 55 to 62 of the transcript. Among other things, he testified to some practical experience he claimed to have had in the operation of one hundred fifty acres of orchard on lands somewhat similar to the lands of the appellees. It was perhaps permissible for this witness to testify as to the result of this practical experiment in so far as his testimony should be concerned with the amount of fruit grown. But whether or not a profit was made in the enterprise was utterly inadmissible, because those things depend not primarily upon the amount of fruit grown, but upon matters as to which no representation whatever had been made, that is, matters of price and cost of production as resulting from good or bad management. Over objection, however, the witness was permitted to testify that the corporation he worked for during this

practical experiment lost forty-seven thousand dollars in money. The testimony appears on pages 55 and 56 of the transcript, where likewise appear the objection that the evidence was inadmissible because immaterial and without the requisite foundation having been laid, the order of the Court overruling the objection, and the exception of appellant thereto. The Court emphasized this bit of testimony in his charge to the jury, (Transcript, page 124) commenting thereon as follows:

> "Mr. Davis went out and experimented to see if he could overcome what he was taught in school. He is wiser now. He paid some forty-seven thousand dollars, according to his statement, in seven years to prove that it was a failure on this land adjoining Rio Linda, land three to four feet deep and underlaid with hardpan."

We respectfully submit that the introduction of this evidence was error, prejudicial to the appellant.

THE COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR A DIRECTED VERDICT.

We shall discuss this specification of error but briefly, because in substance it has been discussed in the argument upon the matter of the demurrer. As appellees were obliged by the rules of the pleading to show affirmatively that they did not discover the fraud until within three years of the commencement of their action, and, more important still, that they could not by the exercise of reasonable active diligence have so discovered it, or the falsity of any material representation relied on, so they were confronted with the

burden of proving such necessary allegations. The testimony of appellees which of course could alone determine this matter, appears on pages 45 to 52 of the transcript.

Appellees are husband and wife. The husband, upon this matter, gave the following testimony: That he came to California and moved onto the land in the first part of November, 1922. (Transcript, page 48.) That before coming he had talked with Amblad, the agent of appellant, about hardpan, and was told by him that although the hardpan was a constituent of his land, it lay at a depth of from three to six feet below the surface (Transcript, page 47), and that when he went upon the land he encountered this hardpan at from sixteen inches to twenty-two inches below the surface, contrary to the statements of Amblad in respect thereto; that that hardpan he discovered to be eighteen feet thick.

Apparently this aroused his suspicions as to the adaptability of his land for fruit culture, but instead of doing as any prudent man would have done, seeking independent advice, which was, of course, available to him, he went back to an agent of the appellant, so he says, who told him that it was not hardpan, but, on the contrary, was volcanic ash, and a beneficial constituent of the soil. True, he was told it would have to be blasted, and the Court told the jury (Transcript, pages 35 and 36) that this necessity for blasting was proof in itself of misrepresentation since the soil, so the Court said, had been represented as being adapted to fruit culture without such preparation. But, passing that for the moment, it is apparent at

this point that whereas Amblad had told him the substance was hardpan, McNaughton, another agent of appellant, told him it was not, but, on the contrary, was a beneficial volcanic ash needed by the trees. Confronted with these conflicting statements he made no inquiry whatsoever from an independent source. The appellant had told him two things directly contradictory of each other concerning this element of his soil, and he rested.

He then says that he started his practical demonstration but not until several years thereafter, evidently concluding that after his exertions in respect of the investigation clearly indicated he was entitled to a well-earned repose. The rest of his testimony amounts to nothing more than "I did not discover."

He says (Transcript, page 49):

> "Prior to March, 1925, I did not find out that the land was not adapted to raising fruit trees. Nobody in the neighborhood ever told me anything about it. Prior to that time I did not learn that the land was not worth $275.00 an acre. Up to that time I had not borrowed any money on my land, I had not had any dealings with any real estate agents, or with anyone about it."

That is the extent of his testimony on excuse of non-discovery. It should be noted that it does not touch upon the matter of value.

Something further was said by the husband not tending to excuse discovery, but tending to emphasize the fact that he possessed information putting him upon guard, which he ignored. He said (Transcript, page 50,) that before coming to California he had talked with a man who had been out to Rio Linda

and returned therefrom, and that this man told him he hoped he was not buying Rio Linda land; that it was all hardpan; that his father had worked for the appellant, and told him the land was all hardpan; that (Transcript, page 51) when he came to the land he did not see any fruit orchards near his lot, but that the orchards were along the creek near the townsite; that he did not (Transcript, page 51): "talk with any of my neighbors about the soil, nor did I talk with anybody around Sacramento about raising fruit on the land that I had bought."

That on discovering hardpan, he inquired of nobody other than Mr. McNaughton, the agent of appellant.

The wife testified as follows (Transcript, page 52):

> "After we came to California I never found out from anyone before March, 1925, that this land was not good fruit land, or that it was not worth $275.00 an acre. I never found out anything along those lines prior to March, 1925."

We submit that the evidence introduced for the purpose of proving that appellees used due diligence in an effort to discover or detect the alleged falsity of the representations they had relied upon falls even farther short of being sufficient than did their allegations touching this matter, which we have hereinbefore discussed. For, in addition to there being a total want of showing of diligence, there is proof of its lack. There were circumstances which should have put them upon inquiry. They had been told by an independent source that it was unwise to buy this land because it was "all hardpan." They discovered that Amblad's statement as to the depth at which it was to be found

beneath the surface of the soil was false. They had been given conflicting statements in respect of the nature of this soil constituent by the agents of appellant. They affirmatively proved they made no inquiries of disinterested parties about the matter of soil quality, although it was and is apparent that such sources of information were readily available, and turning to the more important representation as to value, their only showing is an affirmative showing that they did not inquire of anyone, not even agents of appellant.

Faced with the burden of showing diligence their frank confession is, "We asked nobody and were told nothing about the value of our land." This showing is so amazing as to justify the conclusion that herein they were not frank. It is inconceivable to us that any man buying land upon an express representation as to market value, can live upon the same for over three years and never have inquired of anyone about the matter.

Value of property in a subdivision being actively marketed is ordinarily the subject of more or less constant discussion. It is unbelievable, we submit, that appellees asked no questions and were told nothing for the three years and four months they occupied this property and lived in this community. But, be that as it may, giving to their testimony every inference of which it is reasonably susceptible, it amounts to nothing upon either quality or value, save the bald declaration that appellees "did not discover." Just as such a declaration in their pleading was manifestly insufficient to state a cause of action, so such

declarations in their testimony are equally insufficient to maintain it. The motion for directed verdict should have been granted.

THE COURT ERRED IN INSTRUCTING THE JURY ON THE QUESTION OF APPELLANT'S KNOWLEDGE OF THE FALSITY OF THE ALLEGED REPRESENTATIONS.

The Court's charge in respect of the foregoing is found on pages 32 and 33 of the transcript. Of course, the Court was concerned with the application of the representations to the particular ten acre tract purchased by appellees. With regard to the representations contained in the booklet which appellees claimed they read and relied on, being Plaintiffs' Exhibit 1, the Court stated that in respect of appellees' lot the book declared it to have been "positively proven beyond doubt" that the land was well adapted to the growing of deciduous fruits commercially. Said the Court:

> "There is nothing stronger than that, gentlemen of the jury * * * that is a very positive assertion in kind to impress * * * so when the defendant says it is positively proven it is bound to know the condition of the land. If that representation is false, that the land was well adapted to commercial orcharding, the law imputes to them the knowledge and they are liable accordingly."

Herein, of course, the Court took from the jury the question of whether or not in respect of the ten acre tract purchased by appellees, appellant knew the falsity of that statement. The statement quoted by the Court, inaccurately, it is true, was taken from a letter published in the booklet and signed by one

Brosius, horticultural commissioner of Sacramento County. It refers to the Rio Linda section as the subject of the statements therein made. The letter appears on page 6 of the exhibit. It makes no statement concerning any parcel of ground, and its statements are general, and not particular. It states that "the splendid growth and the excessive yield obtained during the past five or six years has proven beyond a doubt that this district is well adapted for the commercial growing of almonds", etc. Bearing in mind that the Rio Linda section referred to in the letter comprises 12,000 acres of land, it is apparent that the general statements therein made cannot be fairly said to be representations that each and every ten acre parcel in the entire district has been proven beyond a doubt to be well adapted to commercial orcharding. This is especially true when we consider that in other places the reader of that booklet is informed that the conditions in the district do vary. Thus we find, on page 7, the reader informed that the top soil is variable in depth and not adapted to all of the different fruit trees and vines, but variously adapted thereto; that it is underlain by a subsoil denominated hardpan, which varies in depth, texture and character.

It is impossible for a subdivider of a district as large as this to issue literature, however honestly descriptive it may be, which can apply to each and every parcel of ground referred to, and it is absolutely unfair to subject such general statements to any such unreasonable test. That is exactly what the Court did, not even submitting to the jury the question of whether or not the representation was made in

respect of appellees' ten acre lot, and therein we submit the Court erred.

THE COURT ERRED IN INSTRUCTING THE JURY UPON THE DEFINITION OF A "COMMERCIAL ORCHARD."

The Court instructed the jury (Transcript, p. 123):

> "A commercial orchard may be taken to be one that with reasonable care and labor will produce such reasonable crops for such period of time that, at reasonable markets, the whole enterprise throughout its career, will have returned a profit."

We submit it was error for the Court to define the meaning of the term "commercial orchard" as it did. Because of the general language used with regard to care and labor, amount of crop obtained and market price, the only definite thing about this instruction is that an orchard must return a profit. To talk to the jury of reasonable care and labor, reasonable crops, reasonable markets, is to tell them nothing. But the question of profit was prominently placed before them.

The instruction ignores the very vital requirement that the size of the orchard must be taken into consideration, for it is perfectly obvious that however well adapted soil may be to the growth of fruit trees, a profit, granted all the other requirements will or will not be made, depending exactly upon the size of the parcel of land devoted to that purpose. No man can, we submit, go into commercial orcharding on so small a parcel of property as would have been in the possession of these appellees, over and above those

parts of their ten acre tract necessarily occupied by their buildings and their poultry industry, which they admit they intended to go into when they came here, and did enter upon.

Bearing in mind that the definition of commercial orchard, as given by the Court, has application only to the amount of land which the appellees would have available for that purpose, it is apparent that the definition ignored what should have been the most vital part thereof.

THE COURT ERRED IN INSTRUCTING THE JURY ON THE QUESTION OF THE PRESENT ADAPTABILITY OF THE SOIL TO THE RAISING OF FRUIT.

The instruction of the Court in respect of this matter appears on pages 35 and 36 of the transcript. Therein the Court told the jury that the representation made concerning this parcel of land to the appellees by appellant was that it was in its present condition well adapted to commercial orcharding, and that this representation would not be borne out by proof that it would be well adapted if the hardpan were blasted in preparing the soil for that use. In short, that if such proof were believed, it would amount to proof of falsity of the representations. As the Court said: "The representation was that the land is, not that the land can be, adapted by further exertions in the way of blasting."

We submit this was unfair and erroneous. Blasting of lands to be planted to orchard trees is an ordinary and usual method of preparing the soil for that purpose. To tell the jury as a matter of fact that land

which required in the course of good husbandry that such preparation be given it was not adapted by reason of that fact to commercial orcharding was to err doubly: First, in asserting that which was not true; and second, in taking that question from the jury as a matter of fact, and giving it to them as a matter of law, that such preparation was not ordinary or usual.

In this regard it is interesting to compare the Court's ideas in this regard to the ideas held by it in the matter of excusing appellees' failure to discover the falsity of their representations. Hansen had testified that when he came to California he discovered eighteen feet of hardpan eighteen inches beneath the surface of his soil, and was told that he would have to blast in preparing his land for fruit culture. (Transcript, page 48.) In the last portion of his charge (Transcript, pages 133 and 134), the Court was concerned with the matter of telling the jury what might excuse appellees' failure to discover fraud, and, touching upon this matter of hardpan and the blasting thereof, says that Mr. McNaughton, the agent of appellant, quieted the suspicions of appellees which arose when they discovered the hardpan, by telling them that "if you blasted the roots will penetrate and water and air will slack that hardpan."

The Court continued:

> "So he goes to the Company's expert, and the Company's expert quiets his suspicion, if he had any."

Just how the Company's expert could quiet the suspicions of a man by furnishing him with proof that

he had been defrauded is difficult indeed to understand. The position of the Court upon this matter is by the foregoing demonstrated to be utterly inconsistent.

THE COURT ERRED IN INSTRUCTING THE JURY ON THE QUESTION OF THE TIME OF THE DISCOVERY OF THE ALLEGED FRAUD WITH REGARD TO THE STATUTE OF LIMITATIONS.

The instruction of the Court upon the question of discovery appears on pages 36, 37, 38 and 39 of the transcript. We submit that the instruction is contrary to law, and that it failed to properly tell the jury what was required of appellees in establishing, as they were required to, that they had used due diligence to detect the fraud after moving upon the property, and were unable thereby to do so. The Court, throughout its charge, treats this matter as one wherein nothing in the way of diligence was required of these appellees, and charges them only with the duty of diligence after they had discovered fraud or facts sufficient to put them upon notice. Thus the Court says that:

> "They must bring their suit within three years after they discover the fact that they have been defrauded or within three years after they discovered facts which ought in the judgment of the jury to have put them on notice, and which, had they pursued the inquiry with diligence, would have made them acquainted with the proof that they had been defrauded."

The rest of the Court's charge upon this matter is concerned with the matter of what the appellees were not required to do, and not at all with what action

was required of them in the matter of diligence to detect the fraud.

Thus the Court says that because experts differ as to the effect of hardpan in the soil, appellees were excused after discovery of the hardpan from coming to any conclusion about the matter.

We would be perfectly willing to accept such a classification of the representation concerning this matter if the Court had made it consistent throughout and had told the jury as to the representation what it told it with regard to the investigation, that is, that it was a matter of dispute and opinion, to be settled among experts. But the Court found no difficulty in declaring that it was not a matter of opinion whatsoever, but a positive misrepresentation of a material fact, susceptible of knowledge, and that such a representation had in fact been made. We respectfully submit that whatever may have been the sympathy of the Court in this matter, it should not have blown both hot and cold in respect of such vital matters.

Concerning the matter of appellees' discovery that Amblad's representations concerning hardpan were false, and the action of appellees on discovering them to have been false in going to a companion employee of the appellant, the Court seems to have found nothing inconsistent with due diligence in that regard but rather to have considered it the proper and reasonable thing to do, and it tells the jury about that matter and, with regard to appellees' reliance upon what the second agent had told him, in contradiction to what the first had said, says:

> "Again he says he believed it. When you ask yourselves whether he did believe it, ask yourselves why he shouldn't believe it. He still had confidence in the fairness of the Company." (Transcript, page 38.)

In telling the jury that the appellees still had confidence in the fairness of the Company, the Court was not commenting upon evidence, but giving to the jury his conclusions about a matter which should have been left to them. The Court was arguing to the jury that appellees had a perfect right to remain quiescent after that occurrence.

The Court continued (page 38 of Transcript):

> "So he goes to the Company's expert, and the Company's expert quiets his suspicions, if he had and. gives him reassurance that it was all true, that this hardpan was valuable and necessary to contribute to the growth and the productiveness of the trees. He says he believed it. He made no further inquiry, he says. You ask yourselves whether a person in his position ought to listen to any rumor that might pass around, if there was any. He says he heard none. He heard nothing derogatory to the land until after the time that his suit would be in time, February, 1925—in 1925 he proceeded to plant trees. The first year he says they did well. That carried him over the time, Gentlemen of the Jury, when his suit could be in time— He was only required to make inquiry when his suspicions were aroused."

In short, throughout this charge, the Court nowhere tells the jury that it was incumbent upon appellees, if they wished to hold appellant in fraud, to exercise due diligence to detect the existence of fraud when the disability under which they labored in making their bargain was removed. On the contrary, the

Court seeks to excuse them by copiously commenting upon matters such as we have hereinbefore pointed out. We submit the Court herein fell into error.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE QUESTION OF THE STATUTE OF LIMITATIONS, AS REQUESTED IN APPELLANT'S PROPOSED INSTRUCTION NO I.

This instruction requested by appellant appears on pages 40, 41 and 42 of the transcript. We will not repeat it here *in extenso,* but will summarize it by stating that its main purpose was to inform the jury what the Court in its charge signally failed to tell them about, viz., that appellees must prove by a preponderance of the evidence that they have used reasonable diligence to detect the fraud they complain of, and could not by that means do so until a period within three years of the time of filing their suit; that "they were not permitted to remain inactive after the transaction was completed, but it was their duty to exercise reasonable diligence to ascertain the truth of the facts alleged to have been represented to them"; that "they were not excused from the making of such discovery, even if the defendant in such action remains silent"; that "they must show by a preponderance of the evidence not only that they were ignorant of the fraud, up to a date within three years of the commencement of their action, but also that they had used due diligence to detect the fraud after it occurred and could not do so"; that the jury "must believe from a preponderance of the evidence that

they (appellees) neither knew of the fraud nor could with reasonable diligence have discovered the fraud before a date three years prior to the commencement of their action." All of the authorities and arguments hereinbefore quoted and made concerning this matter of the statute of limitations are applicable here. The requested instruction correctly stated the law, pointed out an element, to wit, the necessity for the use of diligence, which the Court in its charge not only omitted, but sought to excuse, and the refusal to give it was error. The refusal to give it was duly excepted to. (Transcript, page 137.)

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY CONCERNING THE EFFECT OF THE DISCOVERY BY APPELLEES OF THE FALSITY OF THE MATERIAL REPRESENTATIONS AS REQUESTED IN APPELLANT'S PROPOSED INSTRUCTION NO. II.

Appellant requested the Court to instruct the jury that: "Upon the matter of plaintiff's discovery of the alleged fraud, if plaintiffs discovered that a material representation concerning the land they bought was false, then they were at once by that discovery presumed to have knowledge of the truth or falsity of the remaining representations, and must bring their action within three years of the discovery of the falsity of any material representation concerning the land."

We have hereinbefore pointed out that in the Court's discussion of this matter of discovery, although it referred extensively to the matter of dis-

covering the falsity of the representations concerning the adaptability of the soil to fruit culture, it signally failed to comment upon the matter of the discovery of the representation as to value, which, as heretofore pointed out, exceeded the other representations in importance and in the damage consequent thereon, if, in fact, it was false. The requested instruction stated the law as we have hereinbefore found it in the authorities cited in this brief pointed out. Indeed, it is elemental that a party who has been defrauded by the making of various false statements concerning the property he purchased is charged upon discovery of the falsity of one material representation with all that diligent inquiry concerning the truth of other representations would disclose, and further, that the statute of limitations begins running upon his cause of action, for he then knows he has been defrauded, and knows all that he need prove in his suit based upon the deceit, for as the Court told the jury in this case, it is not necessary for a person complaining of fraud to prove the falsity of all representations made, and it is enough if he proves that a single material representation was untrue.

Appellees herein were relying upon the misrepresentations of value, as well as upon those of quality. The Court instructed the jury that it was a material representation, a matter of fact and not of opinion. Accepting that as the truth, and remembering that its falsity was much more easily discoverable than was the falsity of the other representations complained of, it is singular, indeed, that the Court, in all the space consumed in excusing appellees for non-discovery of

the quality representations, omitted all mention of that concerning value. True, it would be difficult indeed to formulate an excuse in the latter matter, for as we have hereinbefore said, it is utterly impossible that there could be facts or circumstances justifying a failure to discover the truth of such a matter. Appellees could think of none in their testimony, except to say that they 'had not been told by anyone, and had made inquiries of no one about the matter.'' Certainly appellant was entitled to have the jury instructed upon this most important matter, and we submit the Court erred in refusing to so instruct them.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY CONCERNING THE EFFECT OF APPELLEES' HAVING BEEN ABLE BY REASONABLE DILIGENCE TO DISCOVER THE FALSITY OF THE ALLEGED REPRESENTATIONS AS REQUESTED IN APPELLANT'S PROPOSED INSTRUCTION NO. 5.

Appellant requested the Court to instruct the jury as follows:

> "You are instructed that if the plaintiffs discovered or by the exercise of reasonable diligence could have discovered the falsity of the alleged representations as to value of the land they bought more than three years before they commenced their action, then your verdict must be for the defendant."

What we have heretofore said concerning the refusal to give appellant's Instruction No. II next hereinabove discussed is equally applicable here. By this proposed instruction the Court had pointed out to it specifically the desire of appellant that upon this

most important question of value and the duty of the appellees to exercise diligence in the matter of its discovery, the jury should be clearly instructed. We will not repeat what we have heretofore said about this matter, but submit it upon the arguments hereinbefore advanced. It proves clearly that appellant was seeking to have these matters properly presented to the jury, and that the Court was steadily refusing to do it.

We request that the judgment be reversed.

Respectfully submitted,

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